

October 28, 2008
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioners: Mark Steven Ludwig
Patrick Daniel O'Neill, Jr.

Dates of Filing: September 24, 2008
September 29, 2008

Case Numbers: TFA-0276
TFA-0278

On September 24 and September 29, 2008, Mark Steven Ludwig and Patrick Daniel O'Neill, Jr. (Appellants), respectively, filed appeals from determinations issued to them on August 29, 2008, by the National Nuclear Security Administration Service Center in Albuquerque, New Mexico (NNSA/SC). In the two determinations, NNSA/SC responded to a request for documents that each Appellant submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. At issue in this case is NNSA/SC's determination withholding in its entirety a report (and the majority of its appendices) authored by Norman Bay and John Kern (Bay Report) from each Appellant under Exemption 5 of the FOIA. NNSA withheld the Bay Report and most of its appendices, claiming it was protected by the attorney work-product and attorney-client privileges. The Appellants challenge NNSA/SC's withholding of the Bay Report and its appendices under Exemptions 5. Specifically, they allege that the New Mexico Court of Appeals in *Gingrich v. Sandia Corp.*, 142 N.M. 359 (2007) (*Gingrich*), found that these privileges had been waived by Sandia. Consequently, they argue that NNSA/SC may no longer justify withholding the Bay Report and its appendices pursuant to Exemption 5.¹ This appeal, if granted, would require NNSA/SC to release the Bay Report and its appendices to the Appellants.²

I. Background

The Bay Report was created pursuant to a request of Sandia Corporation (Sandia). Sandia received allegations from two Sandia Ethics Office investigators who claimed their work was being impeded and that they were being retaliated against by Sandia managers as a result of their investigation. Because such allegations would have been investigated by the complaining Ethics

¹ In *Gingrich*, the New Mexico Court of Appeals, citing Rule 11-511 of the New Mexico Rules Annotated regarding waiver of privileges, upheld a District Court Judge's finding that Sandia had waived the attorney-client privilege with regard to the Bay Report through its disclosure of the Bay Report to the plaintiff in the underlying litigation, as well as its "extrajudicial" disclosure to members of Congress and representatives of the Department of Energy. *Id.* at 363. The Court also held that Sandia had also waived attorney work-product privilege for all such Bay Report-related documents that had been similarly communicated to others. *Id.* at 368.

² We will reference the Bay Report and the withheld appendices henceforth as the "Bay Report."

Office investigators themselves, Sandia retained Norman Bay (Bay), a professor of law at the University of New Mexico, to conduct an investigation.

In requests dated February 19, 2008, the appellants each sought from NNSA/SC various documents including the Bay report and all associated appendices. NNSA/SC sent each of the Appellants a determination letter regarding their requests in which the appellants were supplied a number of requested documents. However, NNSA/SC withheld the Bay Report and almost all of the appendices from both Appellants pursuant to Exemption 5 of the FOIA.³ Specifically, NNSA/SC asserted that the Bay Report and its appendices were protected by the attorney work-product and attorney-client privileges and thus were appropriately withheld pursuant to Exemption 5, which exempts documents which would not be available by law to a party other than an agency in litigation with the agency.

The Appellants challenge NNSA/SC's determination on one sole ground. As referenced above, the Appellants direct our attention to the New Mexico Court of Appeals' decision in *Gingrich* to support their argument that Sandia has waived the two privileges that formed the basis of NNSA/SC's invocation of Exemption 5. Consequently, they contend, the Bay Report may not be withheld under Exemption 5.

II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The courts have identified several traditional privileges that fall under this definition of exclusion, including but not limited to the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corporation v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In withholding the Bay Report from the Appellants, NNSA/SC relied upon the attorney-client and attorney work-product privileges of Exemption 5.

Given the facts presented to us, we cannot conclude that the Bay Report may be withheld under Exemption 5 pursuant to the attorney-client or attorney work-product privileges. We have previously held that Sandia can not be considered an agency for purposes of the FOIA. *Caroline C. Roberts*, 27 DOE ¶ 80,284 (Case No. TFA-0023) (April 25, 2003).⁴ The attorney-client privilege "covers facts divulged by a client to his or her attorney, and also covers opinions that the attorney gives the client based upon those facts. The privilege permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts." *Washington*

³ Each of the Appellants were provided three letters contained in the appendices which related to communications from the Appellant's attorney.

⁴ There is no evidence before us that would indicate that the Bay Report was created at the behest of NNSA or as part of a decision making process of NNSA. Consequently, we can not find that the Bay Report is an "intra- or inter-agency" document for the purposes of FOIA.

Electric Cooperative/Downs Rachlin Martin PLLC, 29 DOE ¶ 80,264 (Case No. TFA-0141) (August 3, 2006) (citing *Mead Data Central, Inc. v. Department of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977)) (citation omitted). The attorney work-product privilege protects any document prepared in anticipation of litigation by and for the attorney. *In re Special September 1978 Grand Jury*, 640 F. 2d 49, 62 (7th Cir. 1980) (*1978 Grand Jury*). The attorney-client privilege belongs to the client and the attorney work-product privilege belongs to the client or the attorney. *1978 Grand Jury*, 640 F. 2d at 62. Because Sandia, and not NNSA/SC, engaged Bay as its attorney to prepare the report, the only relevant attorney-client or attorney work-product privilege as to the Bay Report would belong to Sandia or Bay and not to NNSA/SC. Consequently, we find that NNSA/SC has no standing to assert the two privileges cited in its determination letter to the Appellants. We will therefore remand this matter to NNSA/SC to release the Bay Report to the Appellants or issue another determination to the Appellants justifying withholding the Bay Report.⁵

It Is Therefore Ordered That:

(1) The Appeals filed by Mark Steven Ludwig, Case No. TFA-0276 (submitted on September 24, 2008) and Patrick Daniel O'Neill, Jr., Case No. TFA-0278 (submitted on September 29, 2008) are hereby granted as set forth in paragraph (2) and denied in all other respects.

(2) This matter is remanded to National Nuclear Security Administration Service Center for further proceedings as described in the decision above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

⁵ In its reply to the appeal filed by the Appellants, NNSA has raised the possibility that Exemption 6 regarding personal information may apply to the Bay Report. While we will not consider the applicability of Exemption 6 in this decision since NNSA did not invoke Exemption 6 in its determination letters, NNSA on remand may consider whether Exemption 6 is applicable to the Bay Report.

In making its new determination, NNSA may also wish to consider the applicability of Exemption 4 to the Bay Report. See *Charles Varnadore*, 24 DOE ¶ 80,123 (Case No. LFA-0375) (July 21, 1994) (attorney-client and attorney work-product documents submitted to agency from non-agency counsel found to be protected from disclosure by Exemption 4).

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 28, 2008

CONCURRENCE

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Cronin _____

Lipton _____

OGC _____